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No. 97-888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

MICHAEL C. LIDDELL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that the Honorable District Judge George F. Gunn did not abuse his discretion when he refused to modify a complex desegregation remedy until the completion of court-ordered settlement efforts designed to end federal court supervision.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Board of Education of the City of St. Louis (the "Board") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit. That opinion is reported at 126 F.3d 1049 (1997).

STATEMENT OF THE CASE

The district court in this complex school desegregation case has put in place a settlement process designed to end federal court supervision of the St. Louis Public Schools ("SLPS") and to restore local control. Pending the outcome of the settlement efforts, the district court ordered that all components of the remedy would, for the time, remain in place. In the opinion now the subject of the State of Missouri's petition, the Eighth Circuit ruled that the district court acted within its discretion in continuing all components of the remedy pending these settlement efforts. In doing so, the Eighth Circuit recognized that the settlement process was entirely appropriate in view of the complex issues involved in preparing a plan for withdrawing supervision, the value of settlements generally, and the potential for extensive litigation in the future should settlement efforts fail.

District Court Judge George F. Gunn, appointed to the bench by President Ronald W. Reagan, implemented the settlement process based upon his belief that "the best conclusion of this case would be an agreed-upon plan for ending court supervision of the St. Louis Public Schools. . . ." As part of this plan, he appointed a settlement coordinator, Dr. William H. Danforth, former Chancellor of Washington University in St. Louis, who is charged with the authority and responsibility to oversee and stimulate settlement negotiations between the parties.

This process is moving forward. The parties have met with the settlement coordinator, exchanged settlement proposals, both publicly and privately, and the elected representatives of the people of the State of Missouri (the "State") have formed a legislative committee to consider issues under negotiation. (Ironically, the committee has proposed to legislate the continuation for ten more years of the interdistrict transfer program that the Attorney General here seeks to terminate.) Relevant legislation will be introduced in the Missouri General Assembly shortly, and several of the key parties have reached agreement on some issues.

Rather than devote full attention to the settlement process, however, the State has chosen to file a petition for certiorari that distorts the procedural history of the case as well as the opinion of the court of appeals. The petition is riddled with factual inaccuracies and raises issues irrelevant to the issue actually decided by the court of appeals.

The *Milliken I* and *Jenkins III* issues that the State Defendants attempt to raise were not decided by the court of appeals. The court of appeals merely held that until negotiations are complete, the district court was within its discretion in temporarily maintaining the remedy. This holding is based upon fundamental and universally accepted principles of law regarding the value of settlements and the district court's authority to manage litigation. The court of appeals' decision does not require this Court's intervention.

Background

a. *Current Status.* Following a three week evidentiary hearing before the district court on a State motion for unitary status, District Judge George F. Gunn issued an order stating his belief that "the best conclusion of this case would be an agreed upon plan for ending court supervision of the St. Louis Public Schools." *Liddell v. Board of Educ.*, No. 72-100, Order G(2062)96, (E.D. Mo. Apr. 23, 1996). Judge Gunn concluded

that "a serious settlement effort, under the direction of a Settlement Coordinator, should be undertaken." He therefore appointed Dr. William H. Danforth to serve as the coordinator. Judge Gunn also ordered the parties to participate in good faith negotiations and stayed the post-hearing briefing schedule. Finally, he ordered that all components of the remedy then in force would, for the time, remain in effect. *Id.*

In response to a State motion to alter or amend the order appointing Dr. Danforth, the district court ruled that the negotiations would be kept confidential from the court and outside parties and also clarified that it was not the court's intention to have the Settlement Coordinator make recommendations to the court as to how the case should be resolved. *Liddell v. Board of Educ.*, No. 72-100, Order G(2134)96, (E.D. Mo. June 26, 1996). Judge Gunn further stated: "The Court is confident that the Settlement Coordinator will proceed with all due diligence." *Id.*

In the time since the district court appointed Dr. Danforth as settlement coordinator and set forth the settlement procedures, the State has made fourteen unsuccessful attempts to collaterally attack the settlement process.[1] These efforts have caused the

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[1] *See* State's Mot. to Alter or Amend, *Liddell v. Board of Educ.*, No. 72-100, G(2066)96, (E.D. Mo. Apr. 30, 1996); State's Notice of Appeal of Mot. to Alter or Amend. *Liddell v. Board of Educ.*, No. 72-100, G(2151A)96, (E.D. Mo. July 24, 1996); State's Mot. for Stay Pending Appeal, *Liddell v. Board of Educ.*, No. 72-100, G(2149)96, (E.D. Mo. July 24, 1996); State's Mot. for Stay Pending Appeal, *Liddell v. Missouri*, Appeal Nos. 96-2994/3630 (8th Cir. Aug. 15, 1996); State's Application to the United States Supreme Court For Stay Pending Appeal, *Missouri v. Liddell*, Applic. No. A-155 (Aug. 28, 1996); State's Notice of Appeal of Mot. For Stay, *Liddell v. Board of Educ.*, No. 72-100, G(2209)96, (E.D. Mo. Oct. 1, 1996); State's Pet. For Reh'g En Banc, *Liddell v. Missouri*, (Appeal Nos. 96-2994/3630) (8th Cir. Mar. 5, 1997); State's Mot. to Modify, *Liddell v. Board of Educ.*, No. 72-100, G(2338)97, (E.D. Mo. Mar. 14, 1997); State's Notice of Appeal of Mot. to Modify, *Liddell v. Board of Educ.*, No. 72-100, G(2396)97, (E.D. Mo. Apr.

(Footnote 1 continued on next page)

parties to file hundreds of pleadings and briefs and have consumed enormous amounts of time and resources. All the while, the State has complained that the settlement process is moving too slowly.

Despite the State's efforts to attack the settlement process led by Dr. Danforth, that effort is moving forward. Although the settlement process is governed by the district court's order of confidentiality, it is of public record that the settlement coordinator has regularly met with the parties to assess their needs and positions, that the parties have exchanged settlement proposals and counter proposals, and that agreement on some issues has been reached between key parties. Moreover, as recently as September, the Missouri Attorney General called a press conference on the steps of Vashon High School in the SLPS and, despite the order of confidentiality, announced a settlement proposal. *See* Colleen Carroll, *Nixon Proposes Plan to End Busing*, St. Louis Post-Dispatch, Sept. 11, 1997, at 1B.

In addition, the elected representatives of the people of the State of Missouri have formed the "Joint Interim Committee on School Desegregation and Finance" (the "Desegregation Committee") for the specific purpose of analyzing desegregation issues and preparing recommendations and legislation that address or partially address issues under negotiation. *See* Nordeka English, *Sen. House Looking Forward to School Panel Work*, St.

(Footnote 1 continued)

15, 1997); State's Mot. for Expedited Appeal, *Liddell v. Missouri*, Appeal No. 97-2009 (8th Cir. Apr. 15, 1997); State's Mot. to Suspend Inj. Pending Appeal, *Liddell v. Board of Educ.*, No. 72-100, G(2394)97, (E.D. Mo. Apr. 11, 1997); State's Mot. for Stay Pending Appeal, *Liddell v. Missouri*, Appeal No. 97-2009 (8th Cir. Apr. 21, 1997); State's Pet. For Recons. En Banc of Mot. for Stay Pending Appeal, *Liddell v. Missouri*, Appeal No. 97-2009 (8th Cir. Apr. 30, 1997); State's Application to the United States Supreme Court for Stay Pending Appeal, *Missouri v. Liddell*, Applic. No. A-861 (May 28, 1997).

Louis Post-Dispatch, July 31, 1997, at 2. The Desegregation Committee has held hearings, including one in October at Roosevelt High School in the SLPS, and received evidence and testimony from the Board Members and Superintendent of the SLPS, legal counsel for the Plaintiffs in this case, the Settlement Coordinator, and the public at large. *See* Colleen Carroll, *Emotions Run High at Desegregation Talks, More Than 100 Attend Hearing on Public Schools*, St. Louis Post-Dispatch, Oct. 8, 1997, at 1A. On Monday, December 15, 1997, the Desegregation Committee issued its final report, which contained many recommendations to address desegregation issues in St. Louis. Among the recommendations in the final report is one that calls for legislation continuing the interdistrict aspects of the desegregation remedy at issue here as the choice of Missouri's citizens for at least ten more years. *See* Dale Singer, *Panel Urges Ten More Years for Desegregation*, St. Louis Post-Dispatch, Dec. 16, 1997, at A1. In the coming weeks, the Committee's proposal will come before the Missouri General Assembly and will be subject to the State's democratic legislative process.[2]

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[2] The State's assertion that the settlement process is at an impasse does not withstand even cursory scrutiny. The State has made a series of false statements and misrepresentations regarding the progress of settlement efforts. Contrary to the State's representation that the settlement coordinator has initiated only "a handful of meetings over 19 months," in fact there have been dozens of meetings, many more conference calls and numerous other productive settlement activities. The State's allegation that the Board has conditioned settlement on enactment of a State statute locking in a per-pupil expenditure of $9,500 per pupil is also unfounded. The State's Desegregation Committee specifically asked the Board to present testimony and evidence regarding the capital and funding needs of the District. The Board's cooperation in the legislative process is now being taunted by the State as an unreasonable settlement demand. In any case, the State's complaints that the settlement proposals of the parties are "patently unreasonable" are inapposite to the question of whether an impasse exists. The parties viewed the State's public proposal in September as patently inadequate, but they did not declare an impasse in the settlement process. The precise nature and process of

(Footnote 2 continued on next page)

These settlement efforts are the culmination of a seventeen-year effort to remedy the effects of more than 200 years of laws in Missouri that either prohibited the education of black children entirely or subjected black students to an inadequate education in segregated, inferior schools.

b. *A Long History of Discrimination.* The State of Missouri's presence in public education is immense, and the State's Constitution and statutes mandated discrimination against black St. Louis students on the broadest basis possible. *Liddell v. Missouri*, 731 F.2d 1294, 1306 (8th Cir. 1984) ("*Liddell VII*"). Noting the breadth, gravity and duration of the State's violation, the courts found that the constitutional violation committed by the State scarred every student in St. Louis for over five generations and gained legitimacy through the State Constitution and through the State's preeminent role in education. *Id.* at 1308.

The court below described the segregative conditions under the State educational system as follows:

> Under the state-mandated segregated system, white students were generally assigned to schools in their neighborhoods. Black students attended black schools in the "core" of the city. Those black students residing outside the "core" were bused into the black schools; for them there were no

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(Footnote 2 continued)

settlement negotiations dictates that parties may make demands with which opposing parties disagree. Hopefully, a mutually agreeable arrangement is ultimately reached. Finally, the fact that the settlement process has required more time than would be required to resolve a case among two private litigants is understandable. As the State points out, this case has been litigated for many years and involves dozens of parties implementing a complex, multi-faceted remedy in one of the nation's larger metropolitan areas. The settlement effort to resolve this case has involved officials at the highest levels of state and local government, including legislative efforts in 1997 and proposed legislation in 1998. It has also involved assessing and evaluating the needs and positions of many political subdivisions.

> neighborhood schools. Separate overlapping attendance zones were maintained for black and white students. Black students from some suburban St. Louis County school districts were also bused into the City's black schools because state law and practice prohibited them from attending their local schools.

Adams v. United States, 620 F.2d 1277, 1281 (8th Cir. 1980) (*en banc*) ("*Adams*").

In *Liddell v. Board of Education*, 491 F.Supp. 351 (E.D. Mo. 1980), the district court found that the State had compelled school segregation through its constitution, statutory law, practice and policy.[3] *Id.* at 359. The court held that the State "abdicated [its] affirmative duty. . . to obliterate all vestiges of such State imposed segregation" and concluded: "In sum, the State Defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty." *Id.* Therefore, the court held the State and the Board of Education "liable for the de jure segregation which existed in the St. Louis Public Schools." *Id.* at 357. The district court found that since "[t]he primary responsibility for insuring a constitutional structure of public education is the state's, . . . it is appropriate for the Court to order the state to affirmatively participate in remedial efforts." *Id.* at 360 (quoting *United States v. Missouri*, 363 F.Supp. 739, 749 (E.D. Mo. 1973), *aff'd in relevant part*, 515 F.2d 1365 (8th Cir. 1975), *cert. denied*, 423 U.S. 951 (1975)). Noting that "affirmative participation" could include the provision of funding, the court approved implementation of a remedial plan to redress the constitutional violation.

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[3] The district court initially determined that there was no constitutional violation by any of the defendants. *Liddell v. Board of Educ.*, 469 F.Supp. 1304 (E.D. Mo. 1979). That decision was reversed by the Eighth Circuit, and the case was remanded to the district court with instructions to take the steps necessary to remedy the constitutional violation. *See Adams*, 620 F.2d at 1295.

Id. at 360. The Eighth Circuit affirmed the district court's ruling. *Liddell v. Board of Educ.*, 667 F.2d 643 (8th Cir. 1981). This Court refused to review that decision.[4] 454 U.S. 1081 (1981).

In 1981, the Board of Education and the Plaintiffs filed an interdistrict complaint against the State Defendants, school districts in St. Louis, Jefferson and St. Charles Counties, and State, City and County housing authorities noting, *inter alia*, that black students from those districts had been bused into the SLPS for many years to further segregation. In 1983, after the litigation was stayed as to Jefferson and St. Charles Counties and the housing defendants, all twenty-three of the St. Louis County school districts agreed to settle the interdistrict claims against them by voluntarily accepting City children into their schools. This agreement is referred to as the Voluntary Interdistrict Transfer Plan ("VIDT"). The district court ordered the State to fund the VIDT, and the court of appeals affirmed the district court's order. *Liddell v. Board of Educ.*, 567 F.Supp. 1037 (E.D. Mo. 1983), *aff'd*, 731 F.2d 1294 (8th Cir. 1984). In doing so, the Eighth Circuit explained that the State could be ordered to fund the VIDT because of the scope and severity of its segregative acts. The Eighth Circuit noted that under the State's system, "the State bused suburban black students from St. Louis County into the City's black schools to maintain the dual system."[5] *Liddell*

[4] The Court has refused to review this case on five separate occasions. *Liddell v. Board of Educ.*, 839 F.2d 400 (8th Cir.), *cert. denied*, 488 U.S. 825 (1988); *Liddell v. Board of Educ.*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984); *Liddell v. Board of Educ.*, 677 F.2d 626 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *Liddell v. Board of Educ.*, 667 F.2d 643 (8th Cir.) *cert. denied*, 454 U.S. 1081 (1981); *Adams v. United States*, 620 F.2d 1277 (8th Cir.), *cert. denied*, 499 U.S. 826 (1980).

[5] The State's assertion that "the *only* finding of liability made by the courts below was intradistrict in nature" is patently untrue. Pet. at 2. It is well established that the State committed an interdistrict constitutional violation

(Footnote 5 continued on next page)

VII, 731 F.2d at 1306. The court concluded that the voluntary transfer program and other remedial components were consistent with the scope of the State's violation:

> It is clear from the foregoing that the State's presence in public education is immense and that the State's constitution and statutes mandated discrimination against black St. Louis students on the broadest possible basis. . . . Given the breadth of the State's violation, it was appropriate for the district court to mandate an equally comprehensive remedy.

Id. This Court refused to review that decision. 469 U.S. 816 (1984).

c. *The State's Motions for Unitary Status, Its Motion for Relief Under Jenkins III and the Settlement Effort.* Since 1991, the State has filed a series of motions asking the district court to

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(Footnote 5 continued)

by creating and maintaining separate City and County vocational schools to further the dual system. *Liddell*, 677 F.2d at 632, 636; *Liddell*, 667 F.2d at 651; *Liddell*, 491 F.Supp. at 358. Moreover, contrary to the State's repeated assertion that there is no interdistrict aspect to this case, there are findings regarding significant interdistrict segregative acts and effects committed by the State in the St. Louis area. It is of record that "the State bused suburban black students from St. Louis County into the city's black schools to maintain the dual system" and that the State committed other segregative acts that contributed to interdistrict segregation. *See, e.g., Liddell VII*, 731 F.2d at 1306; *Liddell v. Board of Educ.*, 677 F.2d at 632; *Liddell v. Board of Educ.*, 667 F.2d at 651; *Adams*, 620 F.2d at 1280; *Liddell v. Board of Educ.*, 491 F.Supp. at 358; *Liddell v. Board of Educ.*, 469 F.Supp. 1304, 1313 (E.D. Mo. 1979). It is also of record that the "actions of the State of Missouri intensified racial segregation in North St. Louis and in the entire St. Louis area." *Liddell v. Board of Educ.*, 667 F.2d at 657. Indeed, the State frankly admitted to the Eighth Circuit a year ago that "it is not surprising that some language can be found suggesting that State actions had discriminatory effects in the suburban schools." State Reply Brief, *Liddell v. Missouri*, App. Nos. 96-2994/3630, (8th Cir. Jan. 10, 1997) at 21.

declare the SLPS unitary. In describing these motions in its petition, the State presents facts that are simply untrue and fails to include other facts that served as the foundation for the actions of the district court and the Eighth Circuit. These misrepresentations appear directed at creating the misperception that the courts have delayed in addressing the State's motions and otherwise treated the State unfairly.[6] To the contrary, however, any delay in acting on the State's various requests is due to the unorthodox nature and handling of those requests by the State. In many instances, the State is simply the victim of its own "ready-fire-aim" litigation strategy. A recognition of this procedural history is important to a proper and full understanding of the lower courts' rulings. The State's repeated filings have muddied the procedural waters.

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[6] The State's allegation that "the entire history of the 17-year remedial phase of this proceeding has been characterized by collusion and delay" aimed at delaying the return of control of the schools to local authorities is also patently untrue. An admission by the most prominent State Defendant clearly shows the absurdity of the State's conjecture:

> The reason Missouri has been unsuccessful in ending the desegregation cases is that the State has never made a credible attempt to address the concerns of the federal courts. The state has always forcefully and consistently objected to the plaintiffs' demands. However, it has not offered potential solutions to the desegregation problem. . . .

Governor of Missouri. Mel Carnahan, *A Good Faith Effort on Desegregation*, St. Louis Post-Dispatch, Mar. 26, 1995 at 3B; State Response to First Request for Admissions, No. 16, *Liddell v. Board of Educ.*, No. 72-100 (E.D. Mo. 1996).

Moreover, the Board of Education has vigorously sought a return to local control and has often disagreed with the plaintiff groups. One notable example is the Board's August 1995 plan and motions relating to the withdrawal of judicial control through an orderly transition consistent with *Freeman v. Pitts*, 503 U.S. 466 (1992). *See* Board Motions, *Liddell v. Board of Educ.*, No. 72-100, G(1691)95, G(1692)95, G(1694)95, G(1696)95 (E.D. Mo. Aug. 15, 1995).

Late in 1991, the State Defendants filed the first of three different motions for unitary status. The State requested that the district court declare the SLPS "unitary," terminate state desegregation funding as proposed in the motion and ultimately release all defendants from court supervision. The parties, including President Bush's Justice Department, and the district court's own advisors, all responded that consideration of unitary status was clearly premature because the desegregation plans had not been fully implemented as required by this Court's decision in *Board of Education. v. Dowell*, 498 U.S. 237, 248-50 (1991). The State never replied to these responses despite express permission from the district court to do so. Instead, several months later, on May 7, 1992, the State filed a second motion requesting "partial unitary status."

On May 20, 1992, Judge Gunn ruled that the State's request for unitary status was premature, but held that the State was entitled to answers to certain discovery requests because "[t]he possibility exist[ed] that *in the future* such a declaration [of unitary status] might be warranted." *Liddell v. Board of Educ.*, No. 72-100, G(368)92, (E.D. Mo. May 20, 1992) (emphasis added). The State did not appeal Judge Gunn's decision.

In November 1993, the State filed its third motion and called it an "Amended Motion for Unitary Status." As the State conceded that it was not able to prove the allegations in its motion, however, it did not ask the court to schedule a hearing. Instead, the State informed the district court that it would prepare and submit a stipulated schedule for all proceedings on the motion. It estimated that it would be "prepared to present its evidence in support of this amended motion within approximately nine to twelve months." State Motion, *Liddell v. Board of Educ.*, No. 72-100, G(980)93, (E.D. Mo. Nov. 22, 1993).

On October 17, 1994, almost a full year after filing its "Amended Motion" for unitary status, the State finally approached the district court to ask for a hearing date. On February

28, 1995, Judge Gunn granted the State's request and scheduled a hearing for September 1995 in accordance with the schedule proposed by the State. State Motion, *Liddell v. Board of Educ.*, No. 72-100, G(1360)94, (E.D. Mo. Oct. 17, 1994). The hearing was later rescheduled for March 1996 to accommodate the conflicting schedules of the more than twenty parties to this case, including the State Defendants.

On June 12, 1995, as the parties were preparing for the hearing, this Court issued its decision in *Missouri v. Jenkins*, 515 U.S. 70 (1995) ("*Jenkins III*"). In St. Louis, where the facts, prior decisions and procedural history differ significantly from Kansas City, the State Defendants did not file any motion raising alleged "*Jenkins III* issues" or seeking relief under *Jenkins III* for nearly seven months following this Court's decision.

On January 4, 1996, however, as the parties were deeply involved in extensive discovery for the rapidly approaching unitary hearing, the State filed a motion to terminate the VIDT on the basis of the *Jenkins III* decision. The State, however, asked the district court not to rule on its motion. Instead, the State described its motion as "conditional" and not "ripe" for court action because it wanted a ruling on the motion "only if the Court does not enter a finding of unitary status following the March 4, 1996 hearing." State Motion and Memorandum in Support, *Liddell v. Board of Educ.*, No. 72-100, G(1856)96 and G(1858)96, (E.D. Mo. Jan. 4, 1996). Other parties, including the Board of Education, responded that the district court should decide the *Jenkins III* issues prior to the unitary hearing. But the State vehemently opposed any ruling on its requests under *Jenkins III*. State Response, *Liddell v. Board of Educ.*, No. 72-100, G(1922)96, (E.D. Mo. Feb. 5, 1996). The State emphasized that its motion included an "explicit request that the legal issues raised" be addressed "only after the [unitary] hearing and in the event that the unitary motion is not granted in full." *Id.*

On February 15, 1996, the district court denied the *Jenkins III* motion stating that it was "not ripe" and, thus, had been "im-

providently filed." *Liddell v. Board of Educ.*, No. 72-100, G(1939)96, (E.D. Mo. Feb. 15, 1996). The State did not appeal the order denying its motion.

Following extensive discovery, the district court held a three week evidentiary hearing on the State's unitary status motion. Evidence was presented on behalf of more than twenty parties. Pursuant to the district court's directive, the evidence presented related to the elements of the unitary inquiry as well as various proposed plans for phasing out federal court supervision. The parties' proposals ranged from continuation of the VIDT, to a very abrupt termination of the VIDT, to long-range phase out plans.

On April 23, 1996, following the conclusion of the hearing, the district court issued its order stating that "the best conclusion of this case would be an agreed-upon plan for ending Court supervision of the St. Louis Public Schools." *Liddell v. Board of Educ.*, No. 72-100, G(2062)96, (E.D. Mo. Apr. 23, 1996). As noted above, the court appointed Dr. Danforth, established various settlement procedures, and ordered that all components of the remedy would remain in place pending settlement efforts. In response to a State motion to alter or amend the district court's order appointing Dr. Danforth, the district court clarified the settlement procedures. Judge Gunn concluded: "The Court is confident that the Settlement Coordinator will proceed with all due diligence." *Liddell v. Board of Educ.*, No. 72-100, Order G(2134)96, (E.D. Mo. June 24, 1996). (Orders G(2062)96 and G(2134)96 shall hereinafter be referred to collectively as the "settlement procedure orders.")

Despite acknowledging the district court's desire that "the parties... devote full attention to [the] settlement process," State Motion, *Liddell v. Board of Educ.*, No. 72-100, G(2179)96, (E.D. Mo. Aug. 16, 1996), the State appealed the district court's settlement procedure orders and alleged that the district court did

not have authority to continue the VIDT in light of *Jenkins III*. The State also sought to stay the VIDT pending its appeal of the settlement procedure orders. The district court, the court of appeals and Justice Clarence Thomas as Circuit Justice each denied the State's requests to stay the VIDT. *See Liddell v. Board of Educ.*, No. 72-100, Order G(2175)96, (E.D. Mo. Aug. 14, 1996); *Liddell v. Missouri*, App. Nos. 96-2994/3630, Order dated Aug. 23, 1996, (8th Cir. 1996); *Missouri v. Liddell*, Applic. No. A-155, correspondence from United States Supreme Court Clerk, of August 30, 1997. On October 1, 1996, the State also appealed Judge Gunn's denial of the stay pending appeal.

On January 28, 1997, the court of appeals issued its decision dismissing all three of the State's appeals. *See Liddell v. Board of Educ.*, 105 F.3d 1208 (8th Cir. 1997). With regard to the State's appeal of the settlement procedure orders, the Eighth Circuit found the orders to be unappealable, interlocutory, case management orders related only to settlement procedures. *Id.* at 1212. With regard to the appeal of the order denying the State's request for a stay of the VIDT pending appeal, the Eighth Circuit held that such was not an appealable order. *Id.* The Eighth Circuit noted that the State's January 1996 *Jenkins III* motion had been denied by the district court and was not appealed. *Id.* at 1211.

The State's Petition for Rehearing En Banc of these issues was denied. The State did not seek this Court's review of any of those issues.

d. *The Motion to Modify Presently Before the Court.* Following the Eighth Circuit panel's decision dismissing the State's appeals of the settlement procedure orders, (but with its petition for rehearing of those issues en banc still pending), the State filed the motion with the district court that is presently before this Court. (Bd. App. at A-1). The State requested that the district court modify orders related to the VIDT to prohibit the recruitment and enrollment of new students only for the 1997-98 school year.

The State was careful to note that it did *not* "seek the immediate end of its funding obligations for the VIDT program." *Id.* That issue, it felt, "[would] be determined by the Eighth Circuit if the State [was] successful in obtaining a rehearing or rehearing en banc of [the settlement procedure orders]." *Id.* Rather, it only sought an order prohibiting the enrollment of new students for the 1997-98 school year:

> The Court should enter an order, pursuant to Fed. R. Civ. P. 60, modifying its previous orders in this case to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year, that all parties to this action and all advisory panels be prohibited from taking any steps to recruit and enroll new students in the VIDT program for the upcoming school year, and clarifying that the State has no financial obligation as to such students.

(Bd. App. at A-8)

The State specifically reserved the right to raise the larger issue of the propriety of the entire VIDT program under *Milliken v. Bradley*, 418 U.S. 717 (1974) ("*Milliken I*") and *Jenkins III* at a later date: "The State in no way waives its right to seek additional relief from the Court's interdistrict Orders in the future including a complete termination of all State funding for the VIDT program." *Id.* at A-2 n.2. Thus, the *only* issue presented to the district court was whether transfers should be stopped for 1997-98.

On April 10, 1997, the district court issued an order denying the State's motion. (Pet. App. at 23a). The State appealed and again sought a stay of the VIDT pending appeal from the district court, the Eighth Circuit Panel, the Eighth Circuit *en banc*, and the United States Supreme Court. Again, the State's efforts to obtain a stay were rejected by each court. *Liddell v. Board of Educ.*, No. 72-100, Endorsement G(2394)97, (E.D. Apr. 15, 1997); *Liddell v. Missouri*, App. No. 97-2009, Orders dated Apr.

25 and May 22, 1997, (8th Cir. 1997); *Missouri v. Liddell*, Applic. No. A-861, correspondence from United States Supreme Court Clerk, of June 13, 1997.

e. *The Eighth Circuit's Decision Presently Before the Court.* On September 25, 1997, the court of appeals ruled that the district court had acted within its discretion in maintaining the desegregation remedy in place pending settlement negotiations. (Pet. App. 4a.) The court stated precisely its holding that in view of the complexity of the issues and the long history of mandated segregation:

> . . . [t]he district court did not abuse its discretion in denying the State's motion to phase out the voluntary transfer of black city students to the County Districts *pending settlement negotiations.*

(Pet. App. 21a) (emphasis added). The Eighth Circuit noted that it had ruled against the State on a similar question only several months earlier and that the State advanced no new arguments in the present appeal to cause the court to change its position. (Pet. App. 13a.)

The court also noted that the law strongly favors settlements. (Pet. App. at 14a.) The court of appeals stated that particularly in the desegregation setting, solutions depend on the good faith cooperation of all the parties, particularly the defendants. *Id.* Given the complexity of the issues that must be resolved in this case, either by settlement or by court order, the long-history of state-mandated segregation, and the difficulty of developing a plan sufficient to address the complex issues of the case, the court found that settlement would be the preferred conclusion. (Pet. App. at 15a-16a). Based on these factors, the court of appeals reached its ultimate holding and concluded that the district court did not abuse its discretion in refusing the State's request pending settlement negotiations. (Pet. App. at 16a).

REASONS FOR DENYING THE WRIT

I. THE STATE'S PETITION SEEKS TO RAISE AN ISSUE NOT DECIDED BY THE COURTS BELOW

This Court should deny the State's petition for certiorari because the sole issue the State seeks to raise in this Court - the propriety of the VIDT under *Milliken I* and *Jenkins III* - was not ruled on by the lower courts. This Court does not decide issues not resolved in the lower courts. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

The only issue ruled on by the court of appeals was whether the district court abused its discretion when it refused to modify the desegregation remedy pending completion of the settlement process. The court held that considering the complexity of the case, the difficulty of developing a plan to end court supervision and the long history of State-mandated segregation, Judge Gunn did not abuse his discretion. (Pet. App. at 15a).

The State cites selected language and dicta to argue that the court of appeals made a broad substantive ruling on the applicability of *Jenkins III* to the remedy in St. Louis. That is simply wrong. The Eighth Circuit repeated five times that the question raised by the State, presented to the court and being decided was whether the district court erred in refusing to modify the VIDT "at this time" and "pending settlement negotiations." (Pet. App. at 4a, 15a, 16a, 21a).

Following its actual ruling that upheld the district court's decision not to terminate the transfer program during settlement negotiations, the Eighth Circuit discussed some of the difficult practical and legal problems facing the courts and the parties should the settlement efforts fail. The court noted that because the VIDT was the result of a settlement agreement, there has never been a finding in St. Louis that no interdistrict violation

occurred, as was the case in *Jenkins*. (Pet. App. at 19a). Indeed, as noted above, the record and court opinions already included specific findings of interdistrict acts and effects. *See supra* note 5. Thus, the court went on to note that if the interdistrict acts and effects that are of record are insufficient to support the VIDT under *Milliken I* and *Jenkins III*, the plaintiffs would have a due process right to prove further the interdistrict violation so that the courts could determine the proper remedy, if any. *Id.* This would not be without procedural difficulty, however, since the County school districts that had voluntarily participated in the VIDT for many years had received final judgments. *Id.* Thus, there were due process issues as to their involvement in future litigation.[7]

In view of all these circumstances, the Eighth Circuit concluded that the district court acted properly in refusing to terminate the VIDT "pending settlement negotiations." The court never ruled on the larger issue of the effect of *Jenkins III* on the St. Louis remedy.

Because the court of appeals did not decide the issue the State is attempting to raise here, the State's petition should be denied.

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[7] The State argues that the Eighth Circuit ruled that the county districts have a fundamental right to due process arising out of their participation in the VIDT which prevents terminating the VIDT. This argument misstates the court's decision. The court's due process discussion occurred in the context of the legal and procedural complexity of this case as related to the nature and scope of the interdistrict violation in St. Louis. The court noted that the county districts had voluntarily participated in the VIDT for many years under a settlement agreement that entitled them to judgments possibly relieving them from constitutional liability. The court expressed concern that forcing them to participate in further proceedings on the issue of interdistrict liability might conflict with the districts' right to due process. Emphasizing the uniqueness of the situation, however, the court also noted that the "plaintiffs would be equally deprived if they were denied the opportunity to prove interdistrict violations." Nowhere does the court imply, as the State suggests, that the VIDT must continue because the county districts have a right to due process arising out of an injunction.

II. THE EIGHTH CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE BEFORE IT

The Eighth Circuit correctly ruled that Judge Gunn did not abuse his discretion when he refused to modify this complex desegregation remedy pending the completion of court-ordered settlement efforts designed to end federal court supervision. The court fully considered the applicable legal principles, as well as the unique and difficult circumstances of this case. The Eighth Circuit's decision is based upon fundamental and universally accepted principles of law, does not involve a conflict among the circuits, does not involve a question of national importance, and does not require this Court's review.

The inherent powers of district courts include "considerable authority 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 172-73 (1989) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)). This includes "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. ____, 137 L.Ed.2d 945, 968 (1997); *Landis v. North American Co.*, 299 U.S. 248, 254-56 (1936). In desegregation cases in particular, a district court's power is "characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Milliken v. Bradley*, 433 U.S. 267, 288 (1977) (quoting *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955)). This Court has instructed lower courts to "provide for an orderly means for withdrawing from control." *Freeman v. Pitts*, 505 U.S. 467, 490 (1992).

Moreover, it is well settled that the law favors a settlement. *Williams v. First National Bank*, 216 U.S. 582, 595 (1910); *St. Louis Mining and Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898). *See also In re Air Crash Disaster*, 86 F.3d 498,

552 (6th Cir. 1996); *Stewart v. M.D.F., Inc.*, 83 F.3d 247, 252 (8th Cir. 1996); *In re General Motors Corp.*, 55 F.3d 768, 784 (3rd Cir.), *cert. denied*, 116 S.Ct. 88 (1995); *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1486 (11th Cir. 1994); *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993); *Conservation Law Foundation v. Franklin*, 989 F.2d 54, 59 (1st Cir. 1993). This principle is recognized in desegregation cases as well. *See Jones v. Caddo Parish School Bd.*, 704 F.2d 206, 221 (5th Cir. 1983); *Armstrong v. Board of School Directors*, 616 F.2d 305, 318 (7th Cir. 1980).

The rulings of the courts below conform exactly to these principles. The facts of this case demonstrate the correctness of both the district court and the Eighth Circuit rulings. The court of appeals and the district court are familiar with the complex issues that are involved in ending this case. The court of appeals has correctly noted that should it be determined that the findings of interdistrict acts and effects that exist in this case are insufficient to warrant the VIDT, then the plaintiffs would need to be provided an opportunity to prove further the interdistrict violation so that a proper, and possibly broader, remedy could be crafted if needed. This would involve another round of litigation and more court involvement.

Also, if the VIDT is terminated, the SLPS will be forced to accommodate a roughly 30 percent increase in student enrollment. The remedy in this case has been designed to provide education to approximately forty-three thousand students within the SLPS. The district court has required the closure of dozens of school buildings to establish a system able to serve this number of students. Termination of the VIDT, even gradually, will result in an influx of as many as 13,000 students into the

SLPS.[8] At this time, there is simply not enough space or financing to accommodate these children. The SLPS will face a shortage of school buildings, teachers, counselors, books, equipment and supplies. The pupil-teacher ratio would jump to a number in excess of the State's own desirable standards. At the same time, the St. Louis County districts that currently receive students would be forced to terminate hundreds of teachers and be left with vacant or under-utilized facilities.

Resolving these issues in the district court through litigation will bring great disruption and uncertainty to the lives of tens of thousands of children and to the two dozen districts trying to serve those children. The district court, acting within its discretion to manage its cases and direct the course of litigation, has chosen to temporarily maintain the remedies and to implement a settlement process that is designed to resolve all of these issues on terms agreed upon by the parties.

The court of appeals properly ruled that the district court acted within its discretion in refusing to modify the VIDT pending settlement negotiations. In doing so, the Eighth Circuit fully considered the district court's action in light of the many complex issues it faces in ending court supervision and in light of the discretion necessarily lodged with district courts. The court of appeals recognized that Judge Gunn's decision to continue the settlement process under the direction of Dr. Danforth and to provide for the orderly end of court supervision is discretionary, sensible and reasonable.

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[8] Even the "limited" relief sought by the State in the district court and the court of appeals would have caused serious disruption. If no new students are accepted into the VIDT in a given year, enrollment in the City schools would increase by several thousand students over current projections. The school system could not accommodate these additional students without sufficient lead time to somehow provide classroom space, teachers, books, equipment and supplies.

Because the court of appeals based its decision on fundamental principles of law and correctly ruled that the district court acted within its discretion in refusing to modify the VIDT pending the outcome of settlement efforts, this Court need not review the Eighth Circuit's decision.

III. THE ISSUE THE STATE DID RAISE BELOW IS MOOT.

An injunction proceeding becomes moot where the event sought to be enjoined has irretrievably occurred. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969); *Hall v. Beals*, 396 U.S. 45, 48 (1969). This is particularly true where only limited relief is sought. *See Brockington*, 396 U.S. at 43.

Here, the State of Missouri made an affirmative decision to seek modification of an injunction to prohibit the recruitment and enrollment of students to the VIDT for the 1997-98 school year only and to release the State from its obligations to fund the education of such students. The enrollment and recruitment efforts for the 1997-98 school year are now complete. Students have been enrolled and attending school under the program for more than half the year. By the time this case is decided, the school year will be over or nearly over. Thus, even if the State succeeds in its appeal, it will not be able to obtain the relief it sought from the courts below.

Mootness might be considered an unimportant, technical issue had the State not been so extremely precise in the issue that it raised before the district court. The State Defendants repeatedly "request[ed] a limited modification to outstanding orders that merely prohibits any new students from enrolling in the VIDT program for the 1997-98 school year." (Bd. App. at A-2). Seven times in its motion and suggestions in support, the State clarified that it was seeking modification of the interdistrict

components of the remedy only for the 1997-98 school year. *Id.* at A-2, A-3, A-6, A-7, A-8. Even its final prayer for relief is limited to the 1997-98 school year. *Id.* at A-8.

Moreover, the State specifically noted that it was *not* asking the district court to decide the larger issue it now seeks to raise: "The State does not seek the immediate end of its funding obligations for the VIDT program - that more global issue will be determined by the Eighth Circuit Court of Appeals if the State is successful in obtaining a rehearing or a rehearing en banc of [the settlement procedure orders]." *Id.* at A-1 to A-2.

The State maintained this position in the court of appeals where it clarified that "in this appeal, the State seeks only the more limited relief [relating to transfers for the 1997-98 school year]." Brief of Appellants State of Missouri, *Liddell v. Missouri*, App. No. 97-2009 (8th Cir. May 27, 1997), at 4 n.7. It also stated that "resolution of the appeal" must occur in advance of the 1997-98 school year." *Id.* Indeed, the State expressly admitted that the "larger issue remains the subject, for now, of the settlement discussions initiated in April 1996 by the District Court." *Id.*

Thus, the "global issue" — which the State Defendants seek to raise here — was, according to their filings in the district court and the court of appeals, a part of another appeal, which the State Defendants lost and did not bring before this Court.

The expressly limited nature of the State's request supports a refusal to invoke any exception to the mootness doctrine. The State specifically noted its view that the "global issue" of whether *Jenkins III* required the termination of the VIDT was before the court of appeals at the time it filed the motion presently on appeal. The fact that the State did not obtain a favorable ruling on its broader issue from the Eighth Circuit in another appeal should not allow the State to import that issue to this appeal. If

the State was not satisfied with a ruling in another appeal, it should have sought this Court's review of that ruling. Granting the State's Petition would reward its short-sighted litigation tactics.

Because the issue the State raised to the district court is now moot, this Court should deny the State's Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated herein, the State's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100 C(6)
G(2338)97

MICHAEL C. LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION
OF THE CITY OF ST. LOUIS, et al.,
Defendants.

STATE DEFENDANTS' MOTION TO MODIFY THE COURT'S OUTSTANDING INJUNCTIONS RELATING TO THE "VOLUNTARY INTERDISTRICT TRANSFER PLAN" AND SUGGESTIONS IN SUPPORT THEREOF

Two years ago, in *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (*Jenkins III*), the Supreme Court unequivocally held that the State of Missouri cannot be ordered to participate in or fund interdistrict remedies based solely on a finding of an intradistrict violation in a school desegregation case.[1] Since the current interdistrict remedial orders are based purely on intradistrict liability findings, the State, as a matter of law, is entitled to a lifting and dissolution of the interdistrict orders and to release from any further responsibility to fund these programs.

In its present motion, however, the State does not seek the immediate end of its funding obligations for the VIDT program — that more global issue will be determined by the Eighth Circuit Court of Appeals if the State is successful in obtaining a rehearing or a rehearing en banc of appeal numbers 96-2994

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[1] *Missouri v. Jenkins*, 115 S. Ct. 2038, 2050 (1995).

and 96-3630, which were recently dismissed by the Eighth Circuit panel. Instead, the State at this time seeks only an order from the Court directing that all parties and all Court advisory panels immediately cease all efforts to recruit and admit new students into the VIDT program and that relieves the State from any funding obligation as to such students.

As the Court is aware, the cost to the State of providing this program, including transportation to and from every corner of St. Louis County for this now-impermissible program is enormous, amounting to approximately $100 million dollars each year. Further, the other parties to this action have taken the united position that once enrolled in the program, every VIDT child is absolutely entitled to continue in the program through graduation, even *after* this Court declares the SLPS unitary. The other parties are flatly wrong as to the students' legal right to continue in the program once unitary status is ordered in this case. But if they were to prevail in this view, each child enrolled in 1997-98 would be entitled to 12 additional years of schooling in the VIDT, extending this seventeen-year old remedy to at least 2009. As such, the State now requests a limited modification to outstanding orders that merely prohibits any new VIDT students from being added to the VIDT program for the 1997-98 school year.[2]

It is important that this Court promptly issue its order in this regard because the calendar is not standing still. Already, the lottery for VIDT seats is taking place (it began on March 14, 1997) and planning for the 1997-98 budgets for the VICC and the

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[2] The State in no way waives its right to seek additional relief from the Court's interdistrict orders in the future, including a complete termination of all State funding for the VIDT program. The State is entitled to full and complete funding relief as to all the interdistrict programs that have been ordered without any findings of interdistrict liability. *See Jenkins III*, 115 S. Ct. at 2050.

VIDT program will soon be under way (the budgets are due to be submitted in May or June). Any delay is likely to result in needless hardship on prospective VIDT families and needless unhappiness to prospective new students who are accepted into a program that simply cannot continue under the law. Unnecessary delay could also inconvenience the participating school districts that must decide very shortly how many teachers will be retained for the upcoming school year. Under Missouri law, the districts must notify their teachers of who will be retained no later than April 15, 1997.

In light of these impending deadlines and the clear mandate of *Jenkins III*, the Court should modify its previous orders in this case under Fed. R. Civ. P. 60 to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year.[3]

SUGGESTIONS IN SUPPORT

A. Jenkins III *Prohibits Interdistrict Remedies in this Intradistrict Case*

On June 12, 1995, the Supreme Court issued its decision in *Missouri v. Jenkins* which involved, among other things, interdistrict programs that had been ordered by the courts in the intradistrict Kansas City school desegregation case. In that case, the Supreme Court reaffirmed the long-standing principle that a

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[3] The State is aware that the Court had hoped that the long-delayed settlement talks would resolve the program's future. However, recent settlement efforts concerning the issue of new VIDT students for the 1997-98 school year are at an impasse. Any resolution of this issue can only be attained through a ruling of this Court. The State does not now argue that the parties should discontinue their settlement efforts. But the precise question at issue here — will *Jenkins III* be ignored and the State required to continue to fund the costs of students entering the VIDT for the first time in 1997-98 — cannot be resolved through those proceedings and thus requires the Court's determination.

district court "exceeds its remedial authority" when it seeks to cure an intradistrict violation with a remedy that has an interdistrict purpose.[4] The Court, in rejecting the interdistrict components of the Kansas City plan, held that those components exceeded the clear limits on the district court's remedial authority.[5] The Court spelled out its reasoning succinctly:

> [A] desegregation remedy "is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." "[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[6]

The District Court in *Jenkins* lacked such remedial authority because, exactly as in this case, an *inter*district violation had never been found. The only violation that had been found was *intra*district in nature.[7] As held by the Court, "the proper response to an intradistrict violation is an intradistrict remedy."[8]

As in *Jenkins*, there never has been a finding here of an interdistrict violation. Indeed, there has never even been a hearing on interdistrict liability. In 1980 the Court of Appeals made plain the basis of liability, which involves only an *intra*district violation, when it held the Board and the State responsible for past segregation occurring solely *within* the City

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[4] *Jenkins III*, 115 S. Ct. at 2048 (quoting *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (*Milliken I*)).

[5] *Id.* at 2050.

[6] *Id.* at 2048 (quoting *Milliken I*, 418 U.S. at 746).

[7] *Id.* at 2050.

[8] *Id.* (citing *Milliken I*, 418 U.S. at 746-47).

of St. Louis.[9] The Court of Appeals further made clear the solely intradistrict basis of liability in this case when it observed in 1984 that "[w]e emphasize again that the objective of transfers between the city and county is the eradication of segregation *within the city.*"[10]

Although plaintiffs and City Board added a number of suburban districts as defendants in pursuit of their interdistrict claims in the early 1980's, these claims were never resolved and no hearing was ever held on these claims. Instead, in 1983, the suburban districts, plaintiffs and the SLPS entered into a settlement plan, that specifically recited that the suburban districts *did not* admit liability for any interdistrict claims.[11] This Court's order approving the Settlement Plan in 1983 did not add any finding of interdistrict liability and, in adopting most of the plan, endorsed the suburban districts' express exclusion of any admission of interdistrict liability. The Court of Appeals affirmed much of this Court's order approving the settlement plan, including the requirement that the State fund interdistrict remedies based only on an intradistrict violation.[12]

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[9] *Adams v. United States* ("*Liddell II*"), 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980). There was a discrete interdistrict violation assertedly found with respect to the provision of vocational education. But that violation has been addressed by a long-running interdistrict remedy. It would not, of course, justify a system-wide interdistrict remedy. *See Lewis v. Casey*, 116 S.Ct. 2174, 2183 (1996) (scope of the remedy must be congruent with scope of the violation); *Jenkins III* 115 S. Ct. at 2049.

[10] *Liddell v. Missouri*, 731 F.2d 1294, 1302 (8th Cir. 1984) (*Liddell VII*) (emphasis added).

[11] Settlement Agreement, Page 70, §XI, ¶C. In fact, not only has there never been a finding of an interdistrict violation involving any suburban districts, but each such district has actually received a final judgment in its favor.

[12] *Liddell VII*, 731 F.2d at 1302.

In *Jenkins III*, the Supreme Court held that the District Court acted beyond its remedial authority when it ordered the State to fund remedies "not solely designed to redistribute the students *within* the [City]."[13] In the words of Justice Thomas, "[t]he time has come for [the Court] to put the genie back in the bottle."[14] On the basis of the unambiguous holding in *Jenkins III* this Court should modify its previous orders in this case to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year.[15]

B. *Modification of the Court's Injunctions Is Necessary Now*

Already an entire year has passed with no resolution of the State's request that it be released from this case. By the end of this school year, the State will have paid approximately $141 million since the end of the March, 1996 unitary hearing. Now, VICC and the participating school districts are gearing up for another year of interdistrict transfers and the parties are at an impasse in the settlement discussions as to whether new children

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[13] *Id.*, 115 S. Ct. at 2051.

[14] *Id.* at 2066 (Thomas, J., concurring).

[15] The power of the Court to modify its injunctions to stop the enrollment of new students is unquestionable. Indeed, with the change in relevant decisional law represented by *Jenkins III*, it would be clear error for the Court to refuse the relief requested by the State. *See Protectoseal Co. v. Barancik*, 23 F.3d 1184, 1187-88 (7th Cir. 1994) (it is an abuse of discretion to refuse to modify an injunction founded on superseded law when change in law authorizes what previously had been forbidden); *Flavor Corp. of Am. v. Kemin Indus.*, 503 F.2d 729, 732 (8th Cir. 1974) ("[i]t is well established that injunctions do not give rise to vested rights; they enforce only rights existing under current law and conditions"); *Payne v. Toan*, 671 F. Supp. 1247, 1249 (W.D. Mo. 1987) (permanent injunction "must be vacated" where injunction was based on an interpretation of law that has been rendered incorrect by a subsequent Supreme Court decision).

should be enrolled in the VIDT for next year.[16] With the rapid approach of statutory and budgetary deadlines,[17] the Court must act promptly on the issue of whether new children should be permitted to enroll in this legally unjustifiable program for 1997-98. To delay a ruling would not only hamper the planning process of all involved, but would also have the practical effect of denying the State the opportunity to have this issue resolved by the courts before the start of the next school year.

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[16] Because the Court has ordered that the content of the settlement discussions remain confidential, the State is not in a position to amplify its statement that the talks have reached an impasse on this issue. However, if any party were to seek further delay by challenging this assertion, the State is prepared to support it factually.

[17] As a matter of state law, under Mo. Rev. Stat. 168.126, school districts are required to notify probationary teachers who will not be retained on or before April 15 of their termination. And, under the Court's prior orders, budgets for the interdistrict components must be submitted to the Court over the next two to three months. Moreover, the magnet lottery process has already begun and students and their families will soon be looking and planning toward next year.

CONCLUSION

The Court should enter an order, pursuant to Fed. R. Civ. P. 60, modifying its previous orders in this case to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year, that all parties to this action and all advisory panels be prohibited from taking any steps to recruit and enroll new students into the VIDT program for the upcoming school year, and clarifying that the State has no financial obligation as to such students.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct-copy of the foregoing has been served on the parties of record via United States Mail, postage prepaid, on this 14th day of March, 1997.

_____